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Copyright Royalty Board

37 CFR Part 383

[Docket No. 19-CRB-0006-NSR (2021-2025) (NSS IV)]

Digital Performance Right in Sound Recordings and Ephemeral Recordings

AGENCY: Copyright Royalty Board, Library of Congress.

ACTION: Proposed rule.

SUMMARY: The Copyright Royalty Judges are publishing for comment proposed regulations governing the rates and terms for the digital performances of sound recordings by new subscription services and for the making of ephemeral recordings necessary to facilitate those transmissions for the period commencing January 1, 2021, and ending on December 31, 2025.

DATES: Comments and objections, if any, are due no later than [INSERT DATE 30 DAYS AFTER THE DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: You may submit comments and objections, identified by docket number 19-CRB-0006-NSR (2021-2025), by any of the following methods:

CRB's electronic filing application: Submit comments and objections online in eCRB at <https://app.crb.gov/>.

U.S. mail: Copyright Royalty Board, P.O. Box 70977, Washington, DC 20024-0977; or

Overnight service (only USPS Express Mail is acceptable): Copyright Royalty Board, P.O. Box 70977, Washington, DC 20024-0977; or

Commercial courier: **Address** package to: Copyright Royalty Board, Library of Congress, James Madison Memorial Building, LM-403, 101 Independence Avenue SE,

Washington, DC 20559-6000. **Deliver to:** Congressional Courier Acceptance Site, 2nd Street NE and D Street NE, Washington, DC; or

Hand delivery: Library of Congress, James Madison Memorial Building, LM-401, 101 Independence Avenue SE, Washington, DC 20559-6000.

Instructions: Parties unable to use eCRB must submit an original, two paper copies, and an electronic version on a CD. All submissions must include a reference to the Copyright Royalty Board and docket number (19-CRB-0006-NSR (2021-2025)), as well as the *Federal Register* citation for this proposed rule. All submissions will be posted without change to eCRB at <https://app.crb.gov/> including any personal information provided.

Docket: For access to the docket to read submitted background documents or comments, go to eCRB, the Copyright Royalty Board’s electronic filing and case management system, at <https://app.crb.gov/> and search for docket number 19-CRB-000-NSR (2021-2025).

FOR FURTHER INFORMATION CONTACT: Anita Blaine, Program Specialist, by telephone at (202) 707-0078, or by e-mail at crb@loc.gov.

SUPPLEMENTARY INFORMATION:

Background

On October 21, 2019, the Copyright Royalty Judges (Judges) received a joint motion from SoundExchange, Inc., and Sirius XM Inc. to adopt a settlement of their interests regarding the rates and terms for 2021-2025 for certain new subscription services (NSS).¹ Joint Motion to Adopt Settlement, Docket No. 19-CRB-0006-NSR

¹“David Powell d/b/a Circle of God Network Inc. [sic] has also requested to join the Joint Motion.” Joint Motion at 1 n.1.

(2021-2025). The parties request that the Judges adopt the settlement in its entirety as a settlement of rates and terms under Sections 112(e) and 114 of the Copyright Act for new subscription services of the type at issue in the captioned proceeding, *i.e.*, music services provided to residential subscribers as part of a cable or satellite television bundle subject to royalty rates and terms in 37 CFR part 383. Joint Motion at 1. SoundExchange represents sound recording copyright owners and performers. Sirius XM relies on the royalty rates and terms in 37 CFR part 383 for music programming it provides through the DiSH satellite television service. The parties believe that Sirius XM is the only provider of a Part 383 service participating in this proceeding. Joint Motion at 2. The Judges hereby publish the settlement and request comments from the public.

Section 114 of the Copyright Act, title 17 of the United States Code, provides a statutory license that allows for the public performance of sound recordings by means of a digital audio transmission by, among others, new subscription services. 17 U.S.C. 114(f)(1)(A). For purposes of the section 114 license, a new subscription service is a “service that performs sound recordings by means of noninteractive subscription digital audio transmissions and that is not a preexisting subscription service or a preexisting satellite digital audio radio service.” 17 U.S.C. 114(j)(8).

Services using the section 114 license may need to make one or more temporary or “ephemeral” copies of a sound recording to facilitate the transmission of that recording. The section 112 statutory license allows for the making of the necessary ephemeral reproductions. 17 U.S.C. 112(e).

Chapter 8 of the Copyright Act requires the Judges to conduct proceedings every five years to determine the rates and terms for the sections 114 and 112 statutory licenses. 17 U.S.C. 801(b)(1), 804(b)(3)(A). The current proceeding commenced in February 2019 for rates and terms that will become effective on January 1, 2021, and end on December 31, 2025. 84 FR 6021 (Feb. 25, 2019). SoundExchange and Sirius XM each submitted petitions to participate.

Statutory Timing of Adoption of Rates and Terms

Section 801(b)(7)(A) allows for the adoption of rates and terms negotiated by “some or all of the participants in a proceeding at any time during the proceeding” provided the parties submit the negotiated rates and terms to the Judges for approval. The Judges must provide “an opportunity to comment on the agreement” to participants and non-participants in the rate proceeding who “would be bound by the terms, rates, or other determination set by any agreement....” 17 U.S.C. 801(b)(7)(A)(i). Participants in the proceeding may also “object to [the agreement’s] adoption as a basis for statutory terms and rates.” *Id.*

The Judges “may decline to adopt the agreement as a basis for statutory terms and rates for participants that are not parties to the agreement,” only “if any participant [in the proceeding] objects to the agreement and the [Judges] conclude, based on the record before them if one exists, that the agreement does not provide a reasonable basis for setting statutory terms or rates,” 17 U.S.C. 801(b)(7)(A)(ii), or where the negotiated agreement includes provisions that are contrary to the provisions of the applicable license(s) or otherwise contrary to statutory law. *See Scope of the Copyright Royalty Judges Authority to Adopt Confidentiality Requirements upon Copyright Owners within*

a Voluntarily Negotiated License Agreement 78 FR 47421, 47422 (Aug. 5, 2013), citing 74 FR 4537, 4540 (Jan. 26, 2009)

Proposed Adjustments to Rates and Terms

The settlement incorporates the same royalty rate structure presently set forth in 37 CFR part 383, with annual 3% increases in the per-subscriber fee during the coming rate period. The parties have also agreed that certain terms in Part 383 should be those finally determined in the *Web V* proceeding (Docket No. 19-CRB-0005-WR (2021-2025)), rather than those determined in an SDARS (satellite radio and “preexisting” subscription services) proceeding because the parties will have an opportunity to litigate terms issues in *Web V*, and the *Web V* terms will be in effect for the same period as covered by this proceeding. In other respects, the settlement preserves the existing provisions of Part 383 with only minor updating. Joint Motion at 2.

The fact that the Settlement includes proposed terms that have not yet been established in the *Web V* proceeding may raise concern as to whether participants and non-participants in the rate proceeding who would be bound by the terms, rates, or other determination set by any agreement are properly afforded the aforementioned statutory opportunities to object or comment on the agreement. However, the Judges take notice that it is not inappropriate for agreements to incorporate and/or rely in part on events, facts or determinations that have not yet been established, *e.g.*, references to adjustments based on yet to be determined consumer price index measurements. The Judges are also mindful that Congress intended to facilitate and encourage settlement agreements. *See*, H.R. Rep. No. 108–408, at 24 and 30 (2002). Accordingly, objectors and commenters

may knowingly and willingly choose to accept some uncertainty as to future settlement terms and a reference to an outside method for resolving the uncertain issues.

Therefore, the Judges publish the Settlement with the current understanding that doing so is in compliance with the statutory opportunities to object or comment on the agreement.

The public may comment and object to any or all of the proposed regulations contained in this notice.² Such comments and objections must be submitted no later than [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

List of Subjects in 37 CFR Part 383

Copyright, Sound recordings, Webcasters.

For the reasons set forth in the preamble, the Copyright Royalty Judges propose to amend 37 CFR part 383 as follows:

PART 383—RATES AND TERMS FOR SUBSCRIPTION TRANSMISSIONS AND THE REPRODUCTION OF EMPHEMERAL RECORDINGS BY CERTAIN NEW SUBSCRIPTION SERVICES

1. The authority citation for part 383 continues to read as follows:

Authority: 17 U.S.C. 112(e), 114, and 801(b)(1).

² The parties represent that SoundExchange, Sirius XM, and Mr. Powell, all of which have joined the Joint Motion, are the only parties that have filed petitions to participate in this proceeding and, therefore, “there is no basis for the Judges not to adopt the Settlement as the statutory terms and rates under Section 112(e) and 114 for services relying on the royalty rates and terms in 37 CFR part 383.” Joint Motion at 3.

§ 383.1 [Amended]

2. Amend § 383.1 paragraphs (a) and (c) by removing “2016” wherever it appears and adding in its place, “2021”, and by removing “2020” wherever it appears and adding in its place, “2025”;

§ 383.3 [Amended]

3. In § 383.3 amend by:

- a. Revising paragraph (a) by removing the words “statutory licenses” and adding, in their place, the word “License”;
- b. Revising paragraphs (a)(1)(i) through (v);
- c. Revising paragraph (a)(2)(i) through (v); and
- d. Revising paragraph (c).

The revisions read as follows:

(a)***

(1)***

(i) 2021: \$0.0208

(ii) 2022: \$0.0214

(iii) 2023: \$0.0221

(iv) 2024: \$0.0227

(v) 2025: \$0.0234

(2)***

(1) ***

(i) 2021: \$0.0346

(ii) 2022: \$0.0356

(iii) 2023: \$0.0367

(iv) 2024: \$0.0378

(v) 2025: \$0.0390

(c) *Allocation between ephemeral recordings fees and performance royalty fees.* The Collective must credit 5% of all royalty payments as royalty payment for Ephemeral Recordings and credit the remaining 95% to section 114 royalties. All Ephemeral Recordings that a Licensee makes which are necessary and commercially reasonable for making noninteractive digital transmissions through a Service are included in the 5%.

§ 383.4 [Amended]

4. In § 383.4 amend paragraph (a) by:

- a. Removing the words “subscription transmissions” and adding, in their place, the words “Digital audio transmission”;
- b. Removing the words “preexisting satellite digital audio radio services” and adding, in their place, the words “Commercial Webcasters”;
- c. Removing the words “part 382, subpart B” and adding, in their place, the words “part 380, subpart A”;
- d. Removing the years “2013-2017” and adding, in their place, the years “2021-2025”;
- e. Removing the words “For purposes of this section” and adding, in their place, the words “For purposes of this part”.

Dated: November 1, 2019.

Jesse M. Feder
Chief Copyright Royalty Judge.

[FR Doc. 2019-24271 Filed: 11/7/2019 8:45 am; Publication Date: 11/8/2019]